82-202 NO.____

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

RAFAEL BEN-NATAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is the Fourth Amendment's guarantee that search warrants shall not issue except upon probable cause violated when the affidavit in support of the application for a search warrant contains material misrepresentations which render the warrant invalid?

2. Is the Fifth Amendment's right to be prosecuted by indictment, the Sixth Amendment's right to be informed of the nature and cause of the accusation, and the Fourteenth Amendment's guarantee of Due Process of law violated when the Government is permitted to prove a series of uncharged conspiracies upon the trial of an indictment charging a single conspiracy?

The petitioner Rafael Ben-Natan was indicted and charged in one count of a four-count indictment with the crime of conspiracy to import, distribute and to possess with intent to distribute, heroin.[1]

Petitioner was tried before the Honorable Henry Bramwell and a jury, and was found guilty of the single offense charged against him, viz., conspiracy to distribute heroin, and was sentenced to a term of imprisonment of fifteen years and to pay a fine of $25,000.00.

The petitioner was thereafter released on bail, pending appeal.

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1. The original indictment charged petitioner with the same offense and also charged Rafael Saadon and Gabriel Outmezguine with the same conspiracy and with three substantive counts of distribution of heroin.

A superseding indictment was filed charging petitioner with the same offense. Named as co-defendants in the new indictment were Rafael Saadon, Gabriel Outmezguine, Juliette Leinweber and Solomon Asseraf. Counts Two and Three of the superseding indictment, which charged Saadon and Outmezguine with distributing heroin on two separate occasions within the Southern District of New York, were dismissed prior to trial for lack of venue in the Eastern District of New York. Two other defendants, Juliette Leinweber and Solomon Asseraf, were named in Counts One and Four of the indictment (charging conspiracy and distribution, respectively). Leinweber was acquitted of both charges, and Asseraf was a fugitive at the time of trial.

The instant petition is from the aforesaid judgment of conviction, which was affirmed in a decision and order rendered by the United States Court of Appeals for the Second Circuit.[2]

2. The decision of the Court of Appeals was not officially reported.

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

RAFAEL BEN-NATAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Ben-Natal hereby petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed a judgment of conviction entered against him in the United States District Court for the Eastern District of New York.

ORDER BELOW

A memorandum opinion and order were rendered by the United States Court of Appeals for the Second Circuit and are set forth in the Appendix as "Appendix A."

Counsel for the petitioner was retained to submit the instant petition subsequent to the decision of the Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals affirming Petitioner's conviction was dated and entered on June 4, 1982. Jurisdiction is conferred upon this Court by 28 U.S.C. §1254(1).

CONSTITUTIONAL AMENDMENTS INVOLVED

AMENDMENT 4

Unreasonable searches and seizures.
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT 5

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 6

Rights of the accused.
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT 14

Section 1. Citizens of the United States.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

21 U.S.C. §846. *Attempt and conspiracy*

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. §841. *Prohibited acts A*
Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

REASONS FOR GRANTING THE WRIT

The petitioner contends that at his trial the Government introduced evidence derived as a result of a search and seizure carried out pursuant to a search warrant which was issued upon an affidavit containing material misrepresentations which rendered the warrant invalid. Accordingly, the search warrant was not issued upon probable cause, and the search that ensued violated petitioner's Fourth Amendment right to be secure in his papers and effects from an unreasonable search and seizure as guaranteed under the Fourth Amendment to the United States Constitution.

The petitioner also asserts that at his trial upon a single charge of conspiracy, the prosecutor was permitted to adduce proof concerning additional, uncharged conspiracies. This offended petitioner's rights to be prosecuted upon an indictment to be informed of the nature and cause of the accusation and his right to due process of law as guaranteed to him under the Fifth, Sixth and Fourteenth Amendments respectively, to the United States Constitution.

STATEMENT OF THE CASE

A. THE INDICTMENT

The indictment charged the petitioner with a single count of conspiracy to violate the narcotics laws. As charged, the conspiracy encompassed at least three separate unlawful objects, viz., *importation* of heroin from abroad, possession and *distribution* of heroin and finally, possession of substantial amounts of United States currency for the purpose of *purchasing* large quantities of heroin.

B. THE TRIAL

At the core of the Government's case was Marcel Atties, a paid informer whose services were enlisted to gather evidence about, and to prove, this conspiracy.

Atties was a French citizen who, after several years of travelling back and forth from France to the United States for no apparent reason, decided in early 1981 to become an informant for the DEA.

Atties first met James Kibble, the DEA case agent assigned in this matter, in early February, 1981. Atties claimed that prior to meeting with Kibble, he had never had any dealings with heroin, although he had told Kibble at the first meeting that he knew, and could introduce Kibble to drug dealers. Atties also stated that he had made himself a reputation as a drug dealer.

After his initial meeting with Kibble, Atties set about attempting to obtain drugs from petitioner's co-defendant, Gabriel Outmezguine, whom he knew to be a drug addict, and whom he guessed was a drug dealer.

On February 9, Atties met with Outmezguine and made an offer to import five to seven kilograms of heroin from France; Outmezguine expressed an interest in such a

deal. Atties also discussed purchasing small amounts of heroin.

Later, Gabriel Outmezgiune and Atties met the co-defendant Rafael Saadon at a restaurant in Manhattan. They discussed the deal for purchasing a small amount of heroin that had been made, and also, the deal concerning the importation of five to seven kilograms of heroin. About a week later, Atties purchased four ounces of heroin from Saadon and Outmezguine.

In the meantime, Atties also introduced Kibble to Solomon Asseraf, (also named as a co-defendant) Atties' nephew, for the purpose of purchasing heroin.

Asseraf told Kibble and Atties to follow him to Queens Boulevard in Queens County to meet the people who had the heroin. They went in separate cars to Queens Boulevard in front of an Alexanders Department Store where a purchase of two ounces of heroin was consummated.

On May 8, Atties, who had travelled to France, from where he had maintained contact with Outmezgiune and Saadon through the DEA office in New York, returned and met Outmezgiune and Saadon in the Taft Hotel in Manhattan. They asked for samples of the heroin, which Atties agreed to provide.

At this juncture, another undercover agent, William Ward, entered the picture, posing as the importer of the heroin from France. Ward supplied Atties with two grams of pure, undiluted heroin.

Atties told Outmezguine and Saadon that his source (Agent Ward) wanted to see the money that would be used to purchase the large quantity of heroin, and all four men travelled to Queens on the morning of May 11, ostensibly to view the money. However, suspecting that they were being followed, they did not go to the bank.

On the next day, May 12, desirous of keeping the deal alive, Atties met with Saadon inside a restaurant in

Manhattan. At the same time, Special Agent Mella, who was stationed in a surveillance van on the street, opposite the restaurant, saw petitioner standing alone, beside Saadon's car. Later, Agent Mella saw Outmezgiune and Saadon return to this same car, and together with petitioner, they drove off. Atties was growing impatient and after one or two further conversations, it was agreed to meet the next day, May 13, in front of the Alexanders store in Queens.

Atties went to Alexanders at about 9:00 the next morning. He met Outmezgiune, Saadon and the petitioner, whom he had never seen before. After a meeting at a coffee shop, Saadon and Atties went to the Manufacturers Hanover Trust Company Bank and Saadon displayed the contents of three safe deposit boxes containing substantial amounts of money.

After Atties left Saadon at the bank on the morning of May 13, he called the DEA and furnished the numbers of three safe deposit boxes—1106, 1051, and 1024. The agents learned from a bank employee that the safe deposit boxes with numbers 1106, 1051 and 1024 belonged to Saadon and petitioner and that two other persons, Nuriel Outmezgiune[3] and Juliette Leinweber also rented safety deposit boxes—1081 and 1031—at that branch.

With this information, Special Agent Kibble applied for and was issued a warrant to search all five safe deposit boxes. The ensuing search coupled with information obtained from the bank records pertaining to the safe deposit boxes reflected the following:

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3. Co-defendant Outmezgiune's relative.

Box No.	*Lessee*	*Amount Seized*
1106	Saadon Petitioner*	$70,000
1051	Saadon	$77,000
1024	Petitioner	$90,000
1081	Nuriel Outmezguine Juliet Leinweber*	$129,000 2,958 (British Pounds)

*Held Powers of Attorney in Boxes.

Later that day, the defendants, including petitioner, were arrested.

B. PETITIONER'S MOTION TO SUPPRESS

Prior to trial, petitioner moved to suppress the contents of the safe deposit boxes that had been searched pursuant to the warrant. The basis for the application was that Agent Kibble's affidavit in support of the warrant contained material misrepresentations that were made knowingly and deliberately or recklessly. Since Kibble had been an active and constant participant in the entire operation from February until May 1981, the misrepresentation clearly assumed far greater meaning than they might have, had Kibble merely investigated the case by relying on reports and additional information conveyed by others.

The affidavit was willfully or recklessly inaccurate in at least several material respects. Kibble recited that Atties had been shown the contents of three bank safe deposit boxes by Saadon when in fact, defense investigation and the testimony of a bank employee unequivocally established that Saadon only requisitioned and opened his own two boxes on May 13. Kibble further recited that Atties observed $455,000.00 in cash *which he counted,* as well as gold and jewelry, notwithstanding the fact that it

was entirely clear to Kibble that Atties was in the bank for no more than two to three minutes plainly rendering the counting of such a large sum of currency impossible. Kibble also averred that petitioner was waiting outside the bank while Saadon was showing Atties the money, although this was not true as Kibble and his fellow, surveilling agents well knew. Finally, to the extent that the facts recited in the supporting affidavit were not within Kibble's personal knowledge, the affidavit contained not a single statement showing or even tending to show that any information derived from the informant was in any way reliable or trustworthy.

The District Court denied petitioner a hearing on his motion to suppress, and found that even discrediting the statements attacked by petitioner as intentionally or recklessly false, the affidavit alleged sufficient facts to warrant a finding of probable cause.

POINT I

THE DISTRICT COURT ERRED IN DENYING PETITIONER A HEARING ON HIS MOTION TO SUPPRESS AND IN FINDING THAT THE SEARCH WARRANT AS IT PERTAINED TO HIS SAFE DEPOSIT BOX HAD ISSUED UPON PROBABLE CAUSE.

In *Franks v. Delaware*, 438 U.S. 154 (1978) this Court held that where a defendant makes a substantial preliminary showing that the affiant in an affidavit in support of a search warrant has knowingly made intentionally or recklessly false representations therein, the Fourth Amendment requires that a hearing be held at the request of an accused. Petitioner made this requisite showing before the District Court, but was not permitted to establish his claim of perjury or reckless disregard on the

part of the affiant at a hearing. Instead, the trial court found that even accepting petitioner's attack on the warrant, setting aside the material alleged to have been false, there was probable cause to issue a search warrant which was directed, in part, to the contents of petitioner's safe deposit box.

We respectfully submit that in a case such as this where the affiant is, himself, a law enforcement officer who participated actively and regularly in the criminal transaction together with a paid informant, the procedure articulated in *Franks v. Delaware, supra,* of setting aside portions of the warrant affidavit and then determining whether the remaining contents support a finding of probable cause does not fully ensure the integrity of the judicial system.

The facts that distinguish *Franks v. Delaware, supra,* from the instant case were that in *Franks* law enforcement personnel submitted a sworn affidavit whose contents were based upon information obtained from other individuals rather than upon the officers' own direct participation or surveillance of the underlying offense. The claimed bad faith, deliberate or reckless misstatements pertained essentially to the manner in which the officers obtained the information, not to the very truth or falsity of the information itself. In such circumstances, a suppression court could disregard the untruthful statements and go on to decide the question of whether without such statements, the affidavit contained sufficient facts to support a finding of probable cause.

In petitioner's case the DEA agent's knowing and willful or reckless misrepresentations cannot and should not simply have been put aside while the court considered the remaining portions of the affidavit on the issue of the existence of probable cause. Nearly all the facts recited in the warrant affidavit were within Agent Kibble's own personal knowledge which was based upon his active par-

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In petitioner's case the DEA agent's knowing and willful or reckless misrepresentations cannot and should not simply have been put aside while the court considered the remaining portions of the affidavit on the issue of the existence of probable cause. Nearly all the facts recited in the warrant affidavit were within Agent Kibble's own personal knowledge which was based upon his active par-

ticipation in the ongoing operation. The remaining information was derived from fellow DEA agents or from the informant, Atties, whose reliability and credibility were nowhere set forth, contrary to *Aguilar v. Texas*, 378 U.S. 108 (1964). Any misrepresentaitons could only have been the result of Agent Kibble's own knowing and willful or reckless misstatements, the result of the informant's making knowing and willful representations to Kibble or the informant's knowingly withholding material information.

In such circumstances, material misrepresentations impair the integrity of the entire affidavit, rendering the warrant invalid, and the fruits of search conducted thereunder should be excluded from evidence. Any lesser sanction would permit law enforcement personnel to submit affidavits in support of search warrants, knowing that they contained deliberately or recklessly false information which would either not be challenged at all or attacked and then, at worst, be disregarded.

Where the challenged misrepresentations pertain directly to the truth or validity of information that is offered in support of a finding of probable cause, rather than merely to its source or weight, the courts should be loath to accept for further consideration, a warrant affidavit known to contain such deliberate or reckless falsehoods. To proceed to adjudicate the issue of probable cause in such circumstances for the affiant seeking a search warrant, the courts would tacitly be lending their approval to the applicant's dishonest design.

Accordingly, under such facts, the exclusionary rule enumerated in *Weeks v. United States*, 232 U.S. 383 (1914) and re-affirmed in *Franks v. Delaware, supra*, should be applied.

POINT II

THERE WAS A MATERIAL VARIANCE BETWEEN THE SINGLE CONSPIRACY CHARGED IN THE INDICTMENT AND THE MULTIPLE CONSPIRACIES PROVEN AT THE TRIAL AND PETITIONER SUFFERED SUBSTANTIAL PREJUDICE.

The indictment charged petitioner and his four co-defendants with a single conspiracy to import, distribute and purchase heroin from February 1, 1981 through May 13, 1981.

The Government proved at least two, separate and distinct conspiracies, thereby violating petitioner's rights under the Fifth, Sixth and Fourteenth Amendments. The first conspiracy, characterized as "Phase I" by Agent Pavelick consisted of the sale of heroin amounting in total to approximately eight ounces by co-defendants Asseraf, Saadon and Outmezguine to DEA agents. These sales took place on February 6, 9, 12, 18 and 19, 1981. The petitioner was in no way tied to any of these transactions.

On May 8, 1981, after the informer, Atties, returned from France, the DEA initiated a reverse undercover buy operation, Phase II, whereby heroin would be sold to co-defendants Saadon and Outmezguine for approximately $600,000.00.

To tie petitioner to this second conspiracy, the Government relied principally upon approximately $90,000.00 contained in a safe deposit box in his name which was "flashed" by co-defendant Saadon to Atties after Atties had demanded to see the "buy money" at the bank with Saadon. None of this money was ever proved to have originated from "Phase I" or any other drug transaction

Ironically, in its brief to the Court of Appeals, the Government actually urged:

> While it may be rare in a single case for the jury to hear evidence of both aspects of a distribution scheme, this is only because such conspiracies are normally proved through witnesses privy to one part of the scheme, and not because more than one conspiracy exists. (plural emphasis supplied)

Covering all bases, the Government, in its brief below further contended:

> Additionally, even where more than one conspiracy is proved, such a variance constitutes reversible error only when substantial rights are affected.

Even the Government appreciated the problem it had engendered by indicting and trying petitioner as it did.

Plainly, there was no evidence linking the petitioner with the co-defendants in this case. Nevertheless, the Government subjected petitioner to voluminous testimony relating to unconnected crimes in which he took no part. See, *United States v. Bertolotti*, 529 F.2d 149 (2d Cir. 1975). See also, *United States v. Sperling*, 506 F.2d 1323 (2d Cir. 1974).

There are additional compelling considerations leading to a conclusion that there were at least two independent conspiracies in this case. There was a complete disparity of objectives between "Phase" I and "Phase" II. There was no proof of knowledge on the part of the petitioner, of the intimate details of the various operations, nor was there evidence concerning cooperation or mutual dependence among petitioner and the co-defendants. cf. *United States v. Tramunti*, 513 F.2d 1087 (2d Cir. 1975); cf., also, *United States v. Moten*, 564 F.2d 620 (2d Cir. 1977).

Unquestionably, petitioner suffered a tremendous spillover effect when proof concerning "Phase" I was of-

fered against him, and the prejudice was substantial. See, *Kotteakos v. United States*, 328 U.S. 750 (1946); See also, *United States v. Cambindo Valencia*, 609 F.2d 603 (2d Cir.), cert. denied 446 U.S. 940 (1980).

The issue of material, prejudicial variance has arisen with continuing frequency in the Second Circuit as that Court's opinions disclose[4] and we respectfully submit, is an issue to which this Court should address itself.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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4. Compare Judge Timbers' admonition in *Sperling*, *supra*, at p. 1340 with Judge Van Graafeiland's statement in *Bertolotti*, *supra*, at p. 151.

APPENDIX A—MEMORANDUM DECISION AND ORDER OF THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of June, one thousand nine hundred and eighty-two.

PRESENT: Hon. Irving R. Kaufman, Hon. Ralph K. Winter, *Circuit Judges.* Hon. Robert J. Ward, *District Judge, sitting by designation.*

NOS. 81-1476; 81-1480; 81-1482

UNITED STATES OF AMERICA,

Appellee,

v.

GABRIEL OUTMEZGIUNE, RAFAEL SAADON, and RAFAEL BEN-NATAN,

Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

1. Appellants Rafael Saadon and Gabriel Outmezgiune claim that Judge Bramwell erred in refusing to give the entrapment charge requested. In this Circuit, if the defendant adduces some evidence of inducement by the Government, the prosecution then has the burden of establishing the defendant's propensity to commit the crime. *United States v. Valencia,* 645 F.2d 1158, 1166 (2d Cir. 1980); *United States v. Sherman,* 200 F.2d 880, 882-83 (2d Cir. 1952). Assuming that Saadon and Outmezgiune met their burden, the entrapment charge was not necessary "if 'ready and willing without persuasion' and to have been 'awaiting any propitious opportunity to commit the offense.'" *United States v. Riley,* 363 F.2d 955, 959 (2d Cir. 1966). The propensity of Saadon and Outmezgiune to commit the crimes was established overwhelmingly. They instantly accepted the suggestion that they purchase the heroin from France. They were able to deliver heroin to the Drug Enforcement Administration (DEA) informant Marcel Atties on the very day he asked for it. They possessed large amounts of cash which indicated that they were substantial and frequent drug traffickers. Saadon and Outmezgiune adduced nothing to contradict this evidence of propensity. Accordingly, under the circumstances, it was not erroneous for the trial judge to refuse to charge the jury on entrapment. *United States v. Licursi,* 525 F.2d 1164, 1168-69 (2d Cir. 1975).

Appellant Saadon contends that Judge Bramwell improperly refused to charge the jury that "the fact that a person may have been in a state of drug-induced stupor at the time of the commission of a crime may negative the existence of specific intent." There was simply no evidence, however, indicating that Saadon's drug addition led him to be so consistently under the influence of drugs that he was unable to form the mental intent necessary to commit the crimes charged. *See United States v. Busic,* 592 F.2d 13, 21 (2d Cir. 1978).

3. Appellant Saadon also argues that the Government's conduct in this case was so shocking as to violate the Due

Process Clause of the Fifth Amendment in that the Government agents supplied Saadon with 2 grams of heroin which was from 89%-91% pure knowing that he was a heroin addict likely to ingest it thus risking Saadon's life. This claim is without merit. Supplying heroin samples during a narcotics investigation can hardly be labelled "egregious". *Cf. United States v. Alexandro,* No. 81-1435, slip op. at 1718 (2d Cir. Mar. 18, 1982). The purity of the heroin was essential since it was supposed to be a sample of the uncut heroin coming in from France.

4. There was ample evidence to support the conviction of appellant Rafael Ben-Natan. The standard on review is whether " 'upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt.' " *United States v. Rivera,* 513 F.2d 519, 529 (2d Cir.), *cert. denied,* 423 U.S. 948 (1975). Ben-Natan was frequently sighted by DEA agents in or near Saadon's car while Saadon was meeting with Atties and discussing the importation of heroin from France. He participated in a meeting on May 13, 1981 with Sasadon, Atties and Outmezgiune and warned them to be careful of possible surveillance. In addition, one of the safety deposit boxes containing the money to be used for the purchase which was shown by Sadon to Atties belonged to Ben-Natan and he held a power of attorney over another box. The evidence sufficiently demonstrated that Ben-Natan was a knowing participant of the conspiracy.

5. Appellants' other claims are equally without merit.

6. Accordingly, the judgments are affirmed.

S/IRVING R. KAUFMAN

s/RALPH K. WINTER,
Circuit Judges

ROBERT J. WARD, *District Judge*

APPENDIX B — INDICTMENT

CR 81-00321
UNITED STATES OF AMERICA

-against-

RAFAEL SAADON, GABRIEL OUTMEZGIUNE, and RAFAEL BEN-NATAN,

Defendants.

BRAMWELL J.

THE GRAND JURY CHARGES:

COUNT ONE

From February 1, 1981 through May 13, 1981, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants RAFAEL SAADON, GABRIEL OUTMEZGIUNE and RAFAEL BEN-NATAN, together with others known and unknown to the grand jury, did knowingly and intentionally combine, conspire, confederate and agree to violate Title 21, United States Code, Section 841(a)(1).

1. It was part of said conspiracy that the defendants and others known and unknown to the grand jury would import into the United States from places outside thereof substantial quantities of heroin hydrochloride, a Schedule I narcotic drug controlled substance.

2. It was further part of said conspiracy that the defendants and others known and unknown to the grand

jury would possess with intent to distribute and distribute substantial quantities of heroin hydrochloride, a Schedule I narcotic drug controlled substance.

3. It was further a part of said conspiracy that the defendants and others known and unknown to the grand jury would possess substantial amounts of United States currency for the purpose of purchasing large quantities of heroin hydrochloride, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, Section 846).

COUNT TWO

On or about the 9th day of February, 1981, within the Southern District of New York, the defendants RAFAEL SAADON and GABRIEL OUTMEZGIUNE did knowingly and intentionally distribute approximately fifty (50) grams of heroin hydrochloride, a Schedule I narcotic drug controlled substance. (Title 18, United States Code, Section 2 and Title 21, United States Code, Section 841(a)(1)).

COUNT THREE

On or about the 12th day of February, 1981, within the Southern District of New York, the defendants RAFAEL SAADON and GABRIEL OUTMEZGIUNE did knowingly and intentionally distribute approximately one hundred (100) grams of heroin hydrochloride, a Schedule I narcotic drug controlled substance. (Title 18, United States Code, Section 2 and Title 21, United States Code, Section 841(a)(1)).

COUNT FOUR

On or about the 19th day of February, 1981, within the Eastern District of New York, the defendant RAFAEL SAADON, together with others known and unknown to the grand jury, did knowingly and intentionally distribute approximately fifty (50) grams of heroin hydrochloride, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1)).

A TRUE BILL

[Signed by foreman]

[Signed] Edward R. Korman
United States Attorney
Eastern District of New York

APPENDIX C — SUPERSEDING INDICTMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Cr. No. 81 CR 321 (S)

UNITED STATES OF AMERICA

-against-

RAFAEL SAADON, GABRIEL OUTMEZGIUNE, RAFAEL BEN-NATAN, JULIETTE LEINWEBER, and SOLOMON ASSERAF,
Defendants.

BRAMWELL J.
8/31/81

THE GRAND JURY CHARGES:

COUNT ONE

From February 1, 1981 through May 13, 1981, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants RAFAEL SAADON, GABRIEL OUTMEZGIUNE, RAFAEL BEN-NATAN, JULIETTE LEINWEBER and SOLOMON ASSERAF, together with others known and unknown to the grand jury, did knowingly and intentionally combine, conspire, confederate and agree to violate Title 21, United States Code, Section 841(a)(1).

1. It was part of said conspiracy that the defendants and others known and unknown to the grand jury would

import into the United States from places outside thereof substantial quantities of heroin hydrochloride, a Section I narcotic drug controlled substance.

2. It was further part of said conspiracy that the defendants and others known and unknown to the grand jury would possess with intent to distribute and distribute substantial quantities of heroin hydrochloride, a Schedule I narcotic drug controlled substance.

3. It was further a part of said conspiracy that the defendants and others known and unknown to the grand jury would possess substantial amounts of United States currency for the purpose of purchasing large quantities of heroin hydrochloride, Section I narcotic drug controlled substance. (Title 21, United States Code, Section 846).

COUNT TWO

On or about the 9th day of February, 1981, within the Southern District of New York, the defendants RAFAEL SAADON and GABRIEL OUTMEZGIUNE did knowingly and intentionally distribute approximately fifty (50) grams of heroin hydrochloride, a Schedule I narcotic drug controlled substance. (Title 18, United States Code, Section 2 and Title 21, United States Code, Section 841(a)(1).

COUNT THREE

On or about the 12th day of February, 1981, within the Southern District of New York, the defendants RAFAEL SAADON and GABRIEL OUTMEZGIUNE did knowingly and intentionally distribute approximately one hundred (100) grams of heroin hydrochloride, a Schedule I narcotic drug controlled substance. (Title 18, United States Code, Section 2 and Title 21, United States Code, Section 841(a)(1)).

COUNT FOUR

On or about the 19th day of February, 1981, within the Eastern District of New York, the defendants RAFAEL SAADON, JULIETTE LEINWEBER and SOLOMON ASSERAF, did knowingly and intentionally distribute approximately fifty (50) grams of heroin hydrochloride, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2).

A TRUE BILL

Foreman

EDWARD R. KORMAN,
United States Attorney
Eastern District of New York

APPENDIX D—SEARCH WARRANT-AFFIDAVIT

"Branch No. 105
118-30 Queens Boulevard
Forest Hills, New York

5. One Safety Deposit Box
Described As: Box No.
1031 Rented to JULIETTE
LEINWEBER at Manufacturers
Hanover Trust Co., Branch
No. 105, 118-30 Queens
Boulevard, Forest Hills, New York

Eastern District of New York, ss:

JAMES E. KIBBLE, being duly sworn, says That he is a Special Agent of the Drug Enforcement Administration, duly appointed according to law and acting as such.

Upon information and belief, your deponent has reason to believe that evidence including money, narcotics, gold, diamonds, and records of narcotics transactions representing proceeds of narcotics transactions and things of value to be used in exchange for the purchase of narcotics pertaining to a conspiracy to distribute heroin, a Schedule I narcotic drug controlled substance, in violation of Title 21 United States Code, Sections 846 and 881(a)(6) are contained in Safety Deposit Boxes numbered: 1051 (Rented to Rafael Saadon); 1106 (Rented to Rafael Saadon); 1024 (Rented to Rafael Ben-Natan); 1081 (Rented to Muriel Outmezguine); and 1031 (Rented to Juliette Leinweber) at the Manufacturers Hanover Trust Co., Branch No. 105, 118-30 Queens Boulevard, Forest Hills, New York.

The source of your deponent's information and the ground for his belief are:

1) In February and March 1981, your deponent and Marcel Attias, an informant, made the following heroin purchases:

a) Two ounces for $12,000.00 from Fabriel Outmezgiune and Rafael Saadon in the vicinity of 50th Street and 9th Avenue, New York, N.Y.;

b) Four ounces for $24,000.00 from Gabriel Outmezgiune and Rafael Saadon in the vicinity of 54th Street and Lexington Avenue, New York, New York;

c) Two ounces for $13,000 from Solomon Asseraf, Gabriel Outmezgiune, Sharon Jaffe Outmezgiune and Rafael Saadon in the vicinity of 65th Street and Queens Boulevard, Kew Gardens, New York;

2) In later March and early April 1981, Gabriel Outmezgiune and Rafael Saadon asked the informant, Marcel Attias, to attempt to arrange for them to purchase large quantities of heroin from a source that Attias indicated that he could locate.

3) On May 4 and 5, 1981, Marcel Attias, the informant, had a number of telephone conversations with, at various times, Sharon Jaffe Outmezgiune, wife of Gabriel, Gabriel Outmezgiune and Rafael Saadon. These calls were placed by Attias from Paris, France to DEA in New York and thereupon transferred to Gabriel Outmezgiune's New York telephone number in order that they could be monitored by your deponent and other DEA agents. During these conversations, the arrangements for Attias' impending trip to New York with his French heroin source were discussed.

4) On May 7, 1981, Marcel Attias arrived in New York, contacted Rafael Saadon and agreed to meet with him on the following day, May 8, 1981.

5) On May 8, 1981, Marcel Attias furnished a 2 grain sample of heroin provided to him by DEA, to Rafael Saadon and Gabriel Outmezgiune at the Taft Hotel, New York, N.Y.

6) On May 9, May 11 and May 12, 1981, Miguel Attias on one occasion accompanied by Special Agent Bill Ward of the DEA, posing as his French source, continued to negotiate with Rafael Saadon and Gabriel Outmezgiune for Attias and Ward to sell to them seven kilos of heroin for $455,000.

7) On May 13, 1981, Marcel Attias accompanied by Rafael Saadon went to Branch 105, Manufacturers Hanover Trust Co., 118-30 Queens Boulevard, Forest Hills, New York, where Saadon showed Attias the contents of safety deposit boxes 1051 (Rented to Rafael Saadon); 1106 (Rented to Rafael Saadon); and 1024 (Rented to Rafael Ben-Natan). During this time Gabriel Outmezgiune and an individual tentatively identified as Rafael Ben-Natan waited outside the bank. In the three above-described safety deposit boxes, Marcel Attias observed $455,000 in United States currency which he counted. Saadon informed Attias that this was the money intended to be used as payment for the aforementioned seven kilograms of heroin. Attias also observed a large quantity of diamonds and a large quantity of gold.

8) Investigation by other agents of the Drug Enforcement Administration revealed that at the same Manufacturers Hanover Branch described above are safety deposit boxes 1081 rented to Nuriel Outmezgiune, brother of Gabriel, and a participant in the negotiations described above in paragraph (3) of this affidavit.

9) Additionally, investigation revealed that at the same bank Box No. 1031 is rented to Juliette Leinweber. Juliette Leinweber fits the description of Sharon Jaffe Outmezgiune. Additionally, bank employees have informed agents of the DEA that Juliet Leinweber has told them that she is married to or living with Gabriel Outmezgiune; She and Gabriel Outmezgiune have been observed by bank employees to often come to the bank together change large amounts of money and visit the safety box area together.

Further, Nuriel Outmezgiune holds a power of attorney for the above-described safety deposit Box 1031 rented by Juliette Leinweber. Finally, reliable informant information has documented Juliette Leinweber as a courier for the Outmezgiune heroin organization.

Wherefore, your deponent respectfully prays that a warrant issue authorizing him and other agents of the DEA to enter safety deposit boxes numbered 1051 (Rented to Rafael Saadon; 1106 (Rented to Rafael Saadon; 1024 (Rented to Rafael Ben-Natan; 1081 (Rented Nuriel Outmezgiune) and 1031 (Rented to Juliette Leinweber) at Branch No. 105, Manufacturers Hanover Trust Co., 118-30 Queens Boulevard, Forest Hills, New York and there to search for and seize, monies, diamonds, gold or other jewelry, narcotics and records of narcotics transactions constituting evidence of a conspiracy to distribute heroin in violation of 21 U.S.C. Section 846 and proceeds of or things of value used in exchange for narcotics transactions in violation of 21 U.S.C. Section 881(a)(6)."